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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 234

MRS. MARIE REYNOLDS, Who Sues as the Administratrix of the Estate of Hury O. Reynolds, Deceased,
Petitioner and Appellant Below,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, A Corporation,
Respondent and Appellee Below

SUPPLEMENTAL BRIEF AND ARGUMENT ON BEHALF OF RESPONDENT

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OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Alabama is reported in 36 So. 2d 102 (Adv. op.) and is set out in the record herein (R-22).

STATEMENT OF THE CASE

The essential record facts are set out in the Statement of the Case in the initial Brief and Argument on behalf of Respondent (Respondent's Brief, P. 3 to 6, inc.) and will not be repeated. They show that the judgment of the trial court (R-20) and its affirmance by the Supreme Court of Alabama (R-28) involved only the issue of the sufficiency of the pleadings—that is, the Petitioner's Complaint—as gauged by the rules of pleading applicable in the courts of the State of Alabama (R-23).

This Supplemental Brief and Argument is in further elaboration of the statement and argument on Page 18 of Respondent's Brief as follows:

"Petitioner deliberately selected as the forum the state courts of the State of Alabama and deliberately chose the mode of stating and particularizing her Complaint. Her case was fairly heard and the substantive doctrine was fairly applied by the courts *in keeping with the state rules of practice and procedure. Petitioner is bound by the result.*" (Emphasis supplied)

THE ARGUMENT

SUMMARY OF THE ARGUMENT

The opinion and judgment of the Supreme Court of Alabama involved only questions of the sufficiency of pleading under the law of the forum, "non-Federal" questions, and is therefore controlling and not subject to review.

ARGUMENT

Since this Court, in keeping with its practice, granted the petition herein for certiorari to the Supreme Court of Alabama (R-29), Respondent's Brief and Argument as initially filed herein dealt principally with the broader question that

the catalog of actual facts alleged by Petitioner is entirely inadequate to support a right of recovery aside from controlling questions of pleading, procedure and reviewability. This Supplmental Brief and Argument is therefore directed to other issues manifest in the record that the judgments of both the trial court and the Supreme Court of Alabama involved only questions of the sufficiency of Petitioner's pleading under the law of the state forum selected by Petitioner, which are "non-Federal" questions and therefore the judgment of the Supreme Court of Alabama is not subject to review by this Court under the doctrines historically adhered to by it.

In 2 Roberts' Federal Liabilities of Carriers, (Second Edition) 1905, it is declared that:

> "It is also a general rule of unquestioned authority that, in an action to recover damages for the injury or death of a railroad employee based upon the negligence of his employer, the form and sufficiency of the pleadings, like other considerations pertaining to practice and procedure not involving substantive federal rights, are controlled and determinable by the law of the place where suit is brought. This principle is none the less applicable although the action finds or is alleged by either party to find its substantive basis, in whole or in part, either in the Federal Employers' Liability Act or in some federal statute regulating railroad equipment and operation.
>
> "Questions of that nature, arising in connection with such actions when instituted in the courts of the United States, are therefore to be determined by an application of the rules of pleading which obtain in the federal courts, and such adaptations of local procedure as are contemplated by the Conformity Act. Similarly, the formal sufficiency of the pleadings in an action of this kind, when commenced in a state court, is to be tested by the same standards as are pleadings in other actions in such court."

It must be noted that since the publication of the authority above quoted, this Court has promulgated rules of civil pro-

cedure applicable to Federal Courts, which rules result in the Federal Courts not having to concern themselves with the rules of pleadings and practice in the State Courts insofar as actions filed in the Federal Courts are concerned.

Hence, that portion of the rule declared by Roberts, quoted above, relating to the Conformity Act is no longer applicable. *Zumwalt v. Gardner*, 160 Fed. 2d 298. But there is no question that as to actions instituted in the State Courts under the Federal Employers' Liability Act the sufficiency of the pleadings "is to be tested by the same standards as are pleadings in other actions in such court."

In the case of Central Vermont Railway Co. v. White, Administratrix of the Estate of Enoch L. White, 238 US 507, 35 S. Ct. 865, 59 L. ed. 1433, this Court, in reviewing a decision of the Supreme Court of Vermont, with respect to a cause of action commenced in the Vermont Courts, said:

> "There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of the action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought (M'Niel v. Holbrook, 12 Pet. 89, 9 L. ed. 1011)."

In *Mondou v. New York, H. H. & H. R. Co.*, 223 US 1, 56 L. ed. 327, this Court pointed out that it was neither the purpose nor the effect of the Federal Employers' Liability Act "to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure." The question of sufficiency of pleadings in actions filed in State Courts is a non-federal question. Compare 45 USCA Sec. 51, Note 443.

There can be no question but that the decision or judgment of the Supreme Court of Alabama involved in the instant case relates solely to the sufficiency of Counts of the Complaint. This is manifest from the following:

1. The Minute Entry of the Circuit Judge of the Tenth Judicial Circuit of Alabama recites: "It is ordered and adjudged by the court that said demurrer be and the same is hereby sustained; on account of and solely because of the court's sustaining the amended demurrer to Counts Ten, Eleven and Twelve, the plaintiff moves the court for a nonsuit, with notice of appeal to the Supreme Court * * *." (R-20)

2. Each assignment of error of the appellant in the Supreme Court of Alabama related to, and was confined to, rulings by the Circuit Court on the demurrer to the plaintiff's complaint or some Count thereof. (R-22)

3. The opinion rendered by the Supreme Court of Alabama (R-23) clearly shows that the basis of the decision by the Court was the insufficiency of the Counts of the Complaint. Of course, that was the only question before the Supreme Court of Alabama.

In the case of *Radio Station WOW, Inc., v. Johnson*, 323 US 705, 65 S. Ct. 276, 89 L. ed. 569, this Court, in holding that where a State Court's decision rests both upon its determination of a federal question and upon an independent non-federal question, the Supreme Court of the United States will not consider the correctness of the non-federal ground, said:

> "But it is not for us to consider the correctness of the non-Federal ground unless it is an obvious subterfuge to evade consideration of a Federal issue."

Under the rule above stated by this Court in the case of *Central Vermont Railway Co. v. White*, Administratrix of the Estate of Enoch L. White, supra, to the effect that sufficiency of pleadings is a non-federal question, the Supreme Court of the United States will not consider the correctness of the conclusion reached by the Supreme Court of Alabama with respect to such non-federal question, unless the decision

of the State Court with respect thereto "is an obvious subterfuge to evade consideration of a Federal issue." *Radio Station WOW, Inc. v. Johnson, supra.*

It is quite apparent that the opinion of the Supreme Court of Alabama is no subterfuge to evade consideration of a federal question. It would unduly, and unnecessarily, lengthen this Supplemental Brief to set forth in full the opinion of the Supreme Court of Alabama. It is included in the Record (R-22 to 28, inc.). We are confident that it will readily appear to this Court that there is absolutely no basis for any suggestion, much less a conclusion, that the opinion of the Supreme Court of Alabama constitutes subterfuge to evade the consideration of a federal issue. For such opinion, instead of evading any issue, considers the only issue presented to the Supreme Court of Alabama—that is, the sufficiency of the pleadings. That question, we reiterate and emphasize, is solely and purely a non-federal question.

As further demonstrating that no semblance of subterfuge inheres in such opinion, we invite attention to the following statement appearing in said opinion: (R-26):

> "The most that can be said of count 10 is that defendant's alleged neglignt failure to furnish deceased with a reasonably safe place to work consisted in allowing tall canes to grow in close proximity to the railroad track, and which negligence caused plaintiff's intestate, Reynolds, to pursue a different course of conduct, and one alleged to be more hazardous from that ordinarily followed in signaling the engineer, and that while pursuing said different course of conduct he fell between the cars and was killed. Although it is alleged that the different course of conduct followed by Reynolds was more dangerous than the course of conduct ordinarily followed, it is not alleged that it was not reasonably safe. Moreover, the allegation that it was more dangerous is comparative and a conclusion of the pleader."

We respectfully invite this Court to consider the similarity in the process of reasoning by which the Supreme Court of Alabama in the instant case reached the conclusion that Count Ten (R-2 to 5, inc.) was defective and the process of reasoning by which the Supreme Court of Alabama reached the conclusion that the First Count of the Complaint was defective in the case of *Mobile Light & R. Co. v. Therrell*, 205 Ala. 553, 88 So. 667, wherein the Supreme Court of Alabama said:

> "The first count of the complaint is without averment as to the unsafety or inconvenience of the place at which Defendant's car stopped, and at which plaintiff was injured in the course of his disembarkation, except only that it 'was dangerous for a person walking on crutches', and there is no averment that plaintiff was walking on crutches. Manifestly, there was no duty resting on defendant to make stops and invite disembarkations only at places which were safe for persons 'walking on crutches.' Construing the complaint more strongly against the pleader, the stated conclusion that the place was dangerous for persons 'walking on crutches' must be taken as a negation of danger for persons normally conditioned, and hence there is a failure to show a breach of defendant's legal duty in the premises."

In the instant case, and in the *Mobile Light & R. Co. v. Therrell case, supra*, the respective counts under consideration were subject to the objection, or defect, of failure to allege that the place involved "was not reasonably safe". It is significant that no federal question whatsoever was involved in the *Mobile Light & R. Co. v. Therrell case, supra*. Hence, the Supreme Court of Alabama without any federal question present for the evasion of which subterfuge might be possible, has held a count defective for substantially the same reasons as Count Ten, involved in the instant case, was held to be defective by the Supreme Court of Alabama. There is absolutely no basis for believing that the opinion of the Supreme Court of Alabama in the instant case is a device, or subterfuge, to evade

the consideration of a federal question; for the Supreme Court of Alabama has reached the same conclusion as was reached in earlier cases, where no federal question is involved. This, of course, is aside from the fact that a disposition to evade the supreme law of the land should not be imputed to the Supreme Court of Alabama, or any other State Court, in the absence of cogent and forceful indications of such disposition.

In *Lynch v. New York ex rel Pierson*, 293 US 52, 55 S. Ct. 16, 79 L. ed. 191, this Court declared:

> "Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction."

Compare *Radio Station WOW, Inc. v. Johnson, supra.* This Court has expressly held, in accordance with the rule enunciated in the *Lynch v. New York ex rel Pierson case, supra*, that the decision of a State Court in a Federal Employers' Liability Act case is not subject to review by the Supreme Court of the United States, where such decision rests upon adequate and independent state grounds. *Herb v. Pitcairn*, 324 U.S. 117, 65 S. Ct. 459, 89 L. ed. 789.

CONCLUSION

We respectfully insist that the only question involved in this case as presented to the Supreme Court of Alabama was the sufficiency of the pleadings. As the sufficiency of the pleadings is a non-federal question, and as the sole ground of the decision by the State Supreme Court was the insufficiency of the pleadings, no question for review by this Court is presented. If, however, it be said that a federal question was also involved, then certainly the basis and ground of the decision of the State Supreme Court was its determination of the sufficiency of the pleadings. Therefore, the rule enunciated in *Lynch v. New York ex rel Pierson, supra*, and *Radio Station WOW, Inc., v. Johnson, supra*, to the effect that where the judgment of the State Court rests on two grounds, one of which involves a non-federal question, the Supreme Court of the United States will not assume jurisdiction, applies. See also *Loftus v. Illinois*, 92 L. ed. 1294 (decided June 14, 1948) and *Hedgebeth v. North Carolina*, 92 L. ed. 1296 (decided June 14, 1948).

This proceeding should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned Peyton D. Bibb, Attorney for the Respondent, hereby certify that a copy of the foregoing Brief and Argument was served on J. Kirkman Jackson, Esq., Attorney for Petitioner, on the 31st day of December, 1948.

This the 31st day of December, 1948.

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